

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF &
APPENDIX**

B
P
75-2106

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

X

UNITED STATES OF AMERICA ex rel. FRED :
EDWIN JOHNSON,

:
Appellant,

:
-against-

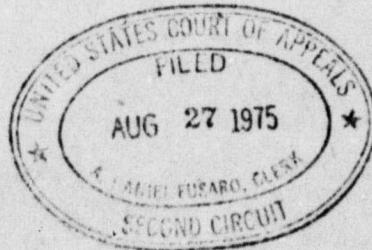
VINCENT R. MANCUSI, Superintendent :
Attica Correctional Facility,

:
Appellee.

X

On appeal from the United States District
Court for the Southern District of New York

APPELLANT'S BRIEF AND APPENDIX



ELEANOR JACKSON PIEL
Attorney for Petitioner-
Appellant
36 West 44th Street
New York, N.Y. 10036
(212) MU 2-8288

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
QUESTIONS PRESENTED	2
FACTS BELOW	2
JUDGE DUFFY'S OPINION	7
ARGUMENT:	
POINT I - THE FINDING OF THE COURT BELOW, BASED ON EVIDENCE ADDUCED AT A STATE COURT CORAM NOBIS HEARING WAS ERRONEOUS IN THAT THE STATE COURT'S CONCLUSIONS AND THE DISTRICT COURT BELOW FAILED TO FOLLOW FEDERAL DUE PROCESS STAN- DARDS ON THE ISSUE OF VOLUNTARINESS	8
POINT II- PETITIONER ESTABLISHED THAT HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE TIME OF PLEA AND SENTENCE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CON- STITUTION	13
CONCLUSION	16

APPENDIX

RELEVANT DOCKET ENTRIES	A-1
NOTICE OF APPEAL	A-2
PETITION FOR WRIT OF HABEAS CORPUS	A-3
OPINION OF MR. JUSTICE CARNEY DENYING PETITIONER CORAM NOBIS RELIEF IN NEW YORK SUPREME COURT	A-6
OPINION AND ORDER APPEALED FROM (DUFFY, D.J.)	A-8

TABLE OF CASES

	<u>Page</u>
Boykin v. Alabama, 395 U.S. 238 (1969)	13
Duncan v. Louisiana, 391 U.S. 45 (1968)	13
Kercheval v. United States, 274 U.S. 220, 223 (1927). .	12
Machibroda v. United States, 368 U.S. 487, 493 (1962) .	8,16
Malloy v. Hogan, 378 U.S. 1 (1964)	13
Messner v. People, 45 N.Y. 1 (1871)	15
Mosher v. La Vallee, 491 F.2d 1346 (2 Cir. 1974), cert. den. 416 U.S. 906 (1974)	10,11,12
People v. Forlano, 19 A.D.2d 365 (1st Dept. 1963) ...	16
People ex rel. Muller v. Martin, 1 N.Y.2d 406 (1956). .	15
Pointer v. Texas, 380 U.S. 400 (1965)	13
Santobello v. New York, 404 U.S. 256 (Marshall dis- sent, p. 267, 1931)	16
United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244, 263 (S.D.N.Y. 1966)	9,16
United States ex rel. Leeson v. Damon, 496 F.2d 718 (2 Cir. 1974)	12
United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2 Cir. 1967)	13
United States ex rel. Oliver v. Vincent, 498 F.2d 340 (2 Cir. 1974)	10,11
United States ex rel. Thurmond v. Mancusi, 275 F.Supp. 508, 515 (.D.N.Y. 1967)	9
United States ex rel. Wiesenfield v. Watkins, 381 F.2d 702, 712 (2 Cir. 1960)	11

CONSTITUTIONAL AND STATUTORY PROVISIONS

	<u>Page</u>
<u>U.S. Constitution</u>	
Sixth Amendment	2, 13
Fourteenth Amendment	13
 28 U.S.C. §2254	1
Federal Rules of Criminal Procedure 32.....	15
 New York Code of Criminal Procedure: §480	5, 15
New York Criminal Procedure Law: §380.50	5, 15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- X
UNITED STATES OF AMERICA ex rel. FRED :
EDWIN JOHNSON, :
Appellant, :
-against- :
VINCENT R. MANCUSI, Superintendent Attica :
Correctional Facility, :
Appellee. :
----- X

On appeal from the United States District
Court for the Southern District of New York

APPELLANT'S BRIEF AND APPENDIX

PRELIMINARY STATEMENT

This is an appeal from the dismissal of a petition for habeas corpus filed pursuant to 28 U.S.C. §2254. The petitioner, Fred Edwin Johnson, had pleaded guilty to two gambling-related state criminal charges along with two other defendants, Frank Shepperson and Robert Royals, in the Supreme Court, New York County and had been sentenced to consecutive prison terms of one year and one and one-half to three years on June 22, 196 . At the time the court below entertained the petition, the petitioner had served his sentence and was at liberty.

The instant petition was brought on after Johnson's unsuccessful direct appeal in the state courts and two coram nobis petitions in which Shepperson and Royals joined him. Johnson is alone in this proceeding and on this appeal.

Petitioner contended below that his plea of guilty was involuntarily entered because he relied on a representation of counsel that the judge had promised no more than a six months sentence and that he was denied the effective assistance of counsel when he changed his plea from not guilty to guilty and at sentencing when he tried unsuccessfully to change his guilty plea to not guilty.

QUESTIONS PRESENTED

1. Did the state court's erroneous legal ruling after a hearing on the issue of the voluntariness of petitioner's guilty plea require a finding of the court below that such plea was involuntary?

2. Under the circumstances of the case was petitioner deprived of his Sixth Amendment right to counsel by the pressuring of the petitioner to plead guilty and by the failure of such counsel to tell the sentencing court the reason why petitioner sought to withdraw his guilty plea (such reason being a misrepresentation by counsel) before sentencing?

FACTS BELOW

The facts were developed at the Coram Nobis hearing

before Justice Carney in the New York Supreme Court.¹ Very briefly they are:

Fred Johnson, the petitioner, was one of three defendants charged by a New York County Grand Jury with the crimes of conspiracy to bribe public officers and to operate a policy business, for operating a policy business and contriving a lottery. The two co-defendants were represented by Nathan Kestnbaum. After the indictment, petitioner discharged his lawyer and at the suggestion of Kestnbaum who wanted a lawyer he could "handle", engaged Morris Levy on Kestnbaum's recommendation (CT. 182). Levy played almost no role as counsel. For all practical purposes as to counseling and advice, Kestnbaum represented all three. Levy was not even present on the day petitioner was sentenced on June 22, 1966.

All three defendants pleaded not guilty but were later persuaded by Kestnbaum to plead guilty.

According to petitioner's own testimony he changed his plea because Kestnbaum told him that the District Attorney would "waste" or "bury" him if he went to trial and because the Judge (Justice Gellinoff) had "guaranteed" that the sentence

1. Counsel for petitioner agreed to submit the case to Judge Duffy on the basis of the hearing minutes of the Coram Nobis proceedings before Justice Carney (Hearing minutes before Judge Duffy, Jan. 24, 1975, p. 12). References to the transcript of the Coram Nobis hearing will be made by CT followed by page number, to the Sentence minutes by S followed by page number.

would not be more than 6 months on the plea of guilty (CT 189, 191, 201, 209, 246, 263, 264). This guaranty was reinforced by Kestnbaum's telling the petitioner about his close personal relationship with the judge and socializing with him at meals as well as other activities (CT. 209, 251, 381). Petitioner's testimony is somewhat contradictory on its face since he says he changed his plea to guilty because of the promise but that he did not really believe it (CT. 219, 272).² Petitioner pleaded guilty to conspiracy (a misdemeanor) and operating a policy business (a felony). He later said he did not understand that he was pleading guilty to a misdemeanor and a felony (CT. 197, 199, 231, 232).

Each of the other two defendants testified at the hearing that he had changed his own plea from not guilty to guilty upon reliance on Kestnbaum's promise from the judge that the sentence would not be more than six months (CT. 80, 81, 293). A third witness corroborated the assertion that Kestnbaum spoke of a guaranty or promise from Judge Gellinoff (CT. 160). At

-
2. In fact this is more of a semantic contradiction than a real one. What it says is that the petitioner was mistrustful of the promise but nonetheless relied on it until shortly before the sentence when he became so mistrustful that he wanted to withdraw his plea of guilty. Moreover, Kestnbaum's testimony at the hearing was that the defendants asked him about a promise just before sentencing and he then told them for the first time that there was no arrangement or promise (CT. 386). Justice Carney in his findings spoke of "perhaps . . . some misrepresentation . . . of . . . counsel".

the time of the change of plea, Kestnbaum directed petitioner not to mention the promise in the questioning from the court (CT. 242).

Even more significant, however, was Kestnbaum's own testimony. Even though he denied that he had relayed a promise from the judge, he said unreservedly that he had "pressured" the defendants to change their pleas (CT. 374). He did not deny that he spoke of his close personal relationship to the judge (CT. 368). The day before the sentence the defendants asked him about the promised six month sentence and for the first time Kestnbaum told them there was no arrangement (CT. 385-387).

Accordingly, on the day of the sentence, petitioner and one co-defendant, realizing for the first time that the relied upon promise would not be kept, insisted that their counsel withdraw the plea (CT. 387). Kestnbaum, when asked by the court whether there was any legal cause why sentence should not be pronounced, recited the desire of two of the three defendants to change their plea and be tried. However, when asked by the Judge the reason for such a request, Kestnbaum did not give the real reason (his own misrepresentation), but stated that in the defendants' opinion the State did not have sufficient evidence (CT. 389).

The record of the sentencing reveals that Code of Criminal Procedure §480 (now codified as Criminal Procedure Law §380.50 and concerned with the courts' obligation to ask a

defendant whether or not he wishes to address the court before sentence) was not followed before the imposition of sentence as to the petitioner Johnson.

Although the court itself asked Shepperson whether "there was anything else you want to say" it did not do so as to Johnson (S. 5, 6).

Johnson testified that he tried to give the real reason for his desire to withdraw his plea, but was silenced by the court officer (CT. 265-9). No issue is presented as to whether or not the Judge in fact made such a promise, since it was stipulated that he had not. Justice Gellinoff, however, did testify that he had dined with Kestnbaum on one occasion and had gone to Kestnbaum's home on another (CT. 420, 421, 422) which gave further corroboration to the petitioner's contention that there was a basis for petitioner's belief that his case would get special consideration because of the judge's relationship to his lawyer.

Justice Gellinoff sentenced petitioner to one year in the penitentiary on the misdemeanor count to be followed consecutively by a state prison sentence of a minimum of a year and a half and a maximum of three years on the felony count -- considerably more than the six months supposedly promised.

Justice Carney denied the writ of Coram Nobis finding that petitioner knowingly entered a plea of guilty which, though

perhaps on "some misrepresentation or estimate of retained counsel" could not be set aside in the absence of proof that either the Judge or District Attorney made a promise which was
³ not kept.

JUDGE DUFFY'S OPINION

Judge Duffy in his opinion below relied heavily on the decision of Justice Carney and recites in it the findings of Judge Carney as follows:

"The defendants pleaded guilty, not because they were coerced into doing so, or did so involuntarily, but because Mr. Kestenbaum [sic] had convinced them that the People had a strong case and because they felt they could safely gamble on his alleged friendship with the judge and his estimate of a sentence of not exceeding six months which they assumed to be a promise. When they found out around sentencing time that the proposed sentence was not an actual promise of the Judge as they had assumed, but only an estimate by the lawyer, then they decided to withdraw their plea if possible."
(A-) (Emphasis supplied)

Based on this, the court below held that

". . . Judge Carney found that Kestenbaum [sic] had made an estimate of the sentence John and his co-defendants would receive, which estimate they only assumed to be a promise. Judge Carney's factual findings reached after a full hearing must be presumed correct, unless Johnson can prove by convincing evidence that they are erroneous.

-
3. As will be pointed out infra petitioner contends that this error of law on the part of Justice Carney (not any error in his fact finding) should not have been followed by Judge Duffy. If, in fact, a misrepresentation of counsel relied on by a defendant resulted in a guilty plea, the defendant should be thereafter entitled to relief by federal habeas corpus.

28 U.S.C. §2254 (d). In this case there is ample basis for Judge Carney's conclusion that Kestenbaum [sic] gave only his estimate of what the sentence could be . . . the finding of the state court that Kestenbaum [sic] gave only his estimate of what the sentence would be must stand." (A- -A-).

It will be petitioner's contention here that Judge Duffy misread and misinterpreted the findings of Justice Carney on the facts. There is no question that Justice Carney found "by objective standards" that defendants thought that their lawyer had a promise from the trial judge that they would get a six-month sentence. Moreover, Justice Carney was under the mistaken belief on the law that there could be no legal relief on coram nobis if petitioner's lawyer had misrepresented a promise, viz.:

"Consequently, if the defendants were induced to plead guilty by some misrepresentation or estimate of retained counsel, as to what their sentence would be, this would be no basis for the granting of a writ of error coram nobis (Peo. v. Vance, 7 A.D.2d 661)." (A-) (Emphasis supplied)

POINT I

THE FINDING OF THE COURT BELOW, BASED ON EVIDENCE ADDUCED AT A STATE COURT CORAM NOBIS HEARING WAS ERRONEOUS IN THAT THE STATE COURT'S CONCLUSIONS AND THE DISTRICT COURT BELOW FAILED TO FOLLOW FEDERAL DUE PROCESS STANDARDS ON THE ISSUE OF VOLUNTARINESS.

In Machibroda v. United States, 368 U.S. 487, 493 (1962) the Supreme Court outlined standards for the entry of a guilty plea in a criminal case.

"A plea of guilty if induced by promises or threats which deprive it of the character of a voluntary act is void. A conviction based upon such a plea is open to collateral attack."

See United States ex rel. Eksnis v. Gilligan, 256 F.Supp. 244, 263 (S.D.N.Y. 1966); United States ex rel. Thurmond v. Mancusi, 275 F.Supp. 508, 515 (E.D.N.Y. 1967). At the coram nobis hearing before Justice Carney which the court below relied upon, petitioner's counsel,⁴ Nathan Kestnbaum, had "guaranteed" that the sentence would not be more than six months on a plea of guilty (CT. 189, 191, 201, 209, 246, 263, 264). Testimony of the other defendants and another witness reinforced this fact (CT. 80, 81, 160, 293). Even though Kestnbaum denied he had relayed a "promise" from the judge to the defendants, he admitted that he "pressured" the defendants and spoke of his close personal relationship to the judge (CT. 368). Moreover the uncontradicted testimony of Kestnbaum was that the defendants had understood him to have promised them a six-months sentence, viz.:

"Q. . . . they assumed from you that they were assured of a sentence along the line of several months, isn't that right?"

4. Even though one Morris Levy was petitioner's counsel of record, it is clear that Nathan Kestnbaum was the acting counsel for petitioner as well as for his co-defendants (CT. 182).

A. I think there were words to that effect, yes."
(CT. 386)

* * * *

"I told them [then] that there had been no arrangement for it." (CT. 387)

"Q. . . . Is it not a fact that when, immediately following and based upon your statement to them that there was no such assurance, they said then 'Well if there is no such assurance, we want our pleas withdrawn'; isn't that what they said?

A. In substance I would say that is so, yes."
(CT. 387)

Justice Carney (followed by Justice Duffy) disregarded the legal consequences of this testimony although he credited it as true, viz.:

". . . if the defendants were induced to plead guilty by some misrepresentation or estimate of retained counsel, as to what their sentence would be, this would be no basis for the granting of a writ of error coram nobis . . ." ([Justice Carney] A-)

Judge Duffy misread this finding by Justice Carney reading out of it the reference to "misrepresentation" and interpreting Justice Carney as holding only that Kestnbaum gave a mistaken "estimate" of time to be served by defendants (A-).

The controlling law applicable as established by recent decisions of this Court was considered by the court below. Those cases are: Mosher v. La Vallee, 491 F.2d 1346 (2 Cir. 1974), cert. den. 416 U.S. 906 (1974) and United States ex rel. Oliver v. Vincent, 498 F.2d 340 (2 Cir. 1974). The

court below correctly states the holdings of both Mosher and Oliver:

". . . where a defendant proves that the circumstances as they existed at the time of the guilty plea, judged by objective standards, reasonably justified his mistaken impression that a promise of leniency had been made, a guilty plea will be set aside as involuntary . . . just as it would be if there were in fact an unfulfilled promise of a lenient sentence made by a judge or prosecutor. . . . In both Mosher and Oliver courts relied upon misrepresentations by defense counsel, believed by the defendants, that a promise of leniency had been made, as the basis for finding that the guilty pleas had been involuntarily entered." ([Judge Duffy] A-).

Petitioner asserts here that his assumption of the six month sentence reasonably supported in the record by the attorney's testimony was the same kind of misrepresentation as discussed in Mosher and Oliver and can so be judged by "objective standards". Cf. United States ex rel. Wissenfield v. Watkins, 381 F.2d 702, 712 (2 Cir. 1960). Contrary to the language of the court below, Justice Carney found active misrepresentation and did not describe "the defendants as merely 'assuming' that Kestnbaum's estimate was a promise" (A-).

The case at bar differs from Mosher and Oliver in that those cases involved a District Judge's finding that in each instance the petitioner relied on the false assurances of counsel. The court below found otherwise but it is petitioner's contention that in so doing Judge Duffy disregarded the clear and uncontroverted testimony in the state record and the factual (if not legal) findings of the state court justice. Just as in

Mosher this

". . . is not a case like those where a guilty plea has been held involuntary because induced by an unfulfilled promise of a lenient sentence made by a judge or prosecutor. See, e.g. Santobello v. New York, 404 U.S. 257 (1971). On the other hand, this is likewise not a case where a defendant's belief that he will receive leniency is induced by an erroneous estimate made by defense counsel, see United States ex rel. Scott v. Mancusi, 429 F. 2d 104, 108 (2 Cir. 1970) cert. denied, 402 U.S. 909 (1971); United States ex rel. Bullock v. Warden, 408 F. 2d 1326, 1330 (2 Cir. 1969), cert. denied, 396 U.S. 1043 (1970), nor is this a case where a defendant pleads guilty under the subjective mistaken impression or belief that a promise has been made by a judge of a lenient sentence and instead a heavy sentence is imposed, see United States ex rel. Curtis v. Zelker, 466 F. 2d 1092, 1098 (2 Cir. 1972); United States ex rel. La Fay v. Fritz, 455 F. 2d 297, 302-03 (2 Cir.), cert. denied, 407 U.S. 93 (1972); in neither of these situations will the guilty plea be held to have been involuntary."

(p. 1347)

There is no question that under the circumstances of this case, the petitioner, when he entered his plea, did not anticipate the consequences nor did he realize that he might receive a sentence of longer than six months. See United States ex rel. Leeson v. Damon, 496 F.2d 718 (2 Cir. 1974). Under these circumstances, petitioner's plea cannot be considered voluntary and must be set aside. Kercheval v. United States, 274 U.S. 220, 223 (1927).

POINT II

PETITIONER ESTABLISHED THAT HE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE TIME OF PLEA AND SENTENCE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The record shows unequivocally that Kestnbaum pressured the petitioner along with all the defendants to plead guilty (CT. 403).

". . . they [the defendants] wanted the case tried; they didn't want to plead; and as I said before, I did pressure them into pleading guilty." (CT. 374)

A plea of guilty involves the waiver of basic constitutional rights. Malloy v. Hogan, 378 U.S. 1 (1964) [right against self-incrimination]; Duncan v. Louisiana, 391 U.S. 45 (1968) [jury trial]; Pointer v. Texas, 380 U.S. 400 (1965) [confrontation of witnesses]. Cf. Boykin v. Alabama, 395 U.S. 238 (1969).

The self-described conduct of Kestnbaum who was at the time representing two other defendants on its face deprived petitioner of the effective assistance of counsel. See United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2 Cir. 1967).

In addition, however, to pressuring the petitioner to plead guilty Kestnbaum was guilty of further improprieties. It is to be recalled that when petitioner appeared for sentence on June 20, 1966, he learned for the first time along with the other defendants that there was no promise of six months and accordingly requested to withdraw his guilty plea. Instead the

sentencing was adjourned to June 22, 1966.

On that date (June 22, 1966) even though Kestnbaum knew the reason why petitioner wished to withdraw his plea, he failed to so inform the court. Said Kestnbaum:

"I didn't think that was material to the matter of withdrawal of a plea.

THE COURT: Why not? In other words, if it was a fact that these people agreed to plead guilty on the false assumption, as you claim, that you had a promise from the judge that they would get a certain sentence, why wasn't that important? That showed the reason that they wanted to withdraw the plea, didn't it?

THE WITNESS: Except that my understanding of the law was, Your Honor, that where the court makes a promise and doesn't keep it, that entitles the defendants; but where there has been a lack of communication between attorney and client, it was my impression of the law as it existed then that there was no basis for withdrawal of a plea.

THE COURT: Technically, no; but there might be something the judge might be interested in hearing." (CT. 413, 414)

Then, at this important moment, the attorney misrepresented the situation to the court to the petitioner's prejudice.

At this juncture, the court itself failed to afford petitioner his right to allocution.

The court below dismissed this point raised by petitioner summarily on the grounds that

"if he [Johnson] made any effort to speak up, [he] certainly did not make much of an effort." (A-)

The court below then found (despite a defendant's statutory

right to be afforded an opportunity to speak -- pursuant to old Code of Criminal Procedure §480 and new Criminal Procedure Law §380.50) :

"The fact that Johnson made no significant effort to speak up, if indeed he made any effort at all, seems to me to undercut any claim he has that he was substantially prejudiced as a result of Kestenbaum's [sic] conduct." (A-)

In support of petitioner's contention that he was deprived of his constitutional right to counsel, the following is significant. The lawyer admitted he "pressured" the defendant -- that he invoked his social relationship with the judge and that he misrepresented to the judge at the time of sentence the real reason the defendant wanted to change his plea on the mistaken belief that the reason would not be sufficient grounds for withdrawing the guilty plea. This was compounded by the court's failure to order the clerk or ask itself whether the defendant, himself, had any legal cause why judgment should not be pronounced against him. According to the law followed in New York, this failure would have invalidated the conviction.

Messner v. People, 45 N.Y. 1 (1871); People ex rel. Muller v. Martin, 1 N.Y.2d 406 (1956); cf. Crim. Proc. Law §380.50 F.R.C.P. 32. It is not here contended that the failure to afford the defendant his statutory right of allocution presents a federal constitutional issue by itself, but considered with the other factors surrounding the unfairness of the proceedings it has significance as to whether or not the judge would have permitted the withdrawal of the plea had the true

facts been revealed. See United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966); People v. Forlano, 19 A.D.2d 365 (1st Dept. 1963). At that juncture, before sentence, there had been no prejudice to the State and the not guilty plea could have been reinstated. See Santobello v. New York, 404 U.S. 256 (Marshall dissent, p. 267, 1931).

In addition, the testimony of Kestnbaum as to the "pressure" he exerted taken into consideration with the defendant's description of his state of mind at the time he changed his plea establishes that the plea, itself, was not voluntary as has been required by the standard of our highest court in Machibroda v. United States, 368 U.S. 487, 493 (1962).

CONCLUSION

Because of the circumstances in the case at bar, including the ineffective assistance of counsel, petitioner's change of plea did not reflect a deliberate and measured choice. The judgment of the court below should be reversed and the petition for a writ of habeas corpus granted.

Respectfully submitted,

ELEANOR JACKSON PIEL
Attorney for Petitioner-
Appellant

August 28, 1975.

APPENDIX

RELEVANT DOCKET ENTRIES

(United States District Court for the
Southern District of New York)

1. C.J.A. form 20 -- appointment of counsel.
2. Respondent's Supplemental Memorandum of Law.
3. Transcript of Proceedings of January 24, 1975.
4. Opinion and order of Judge Duffy.
5. Notice of Appeal with endorsement and authorization
for certificate.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA, ex rel.
FRED EDWIN JOHNSON,

Plaintiff,

NOTICE OF APPEAL

71 Civ. 2426

-against-

VINCENT R. MANCUSI, Warden,
Attica State Prison,

Defendant.

-----x
SIRS:

PLEASE TAKE NOTICE that the Petitioner, Fred Edwin Johnson appeals to the United States Court of Appeals for the Second Circuit from the order of Judge Kevin Thomas Duffy of June 9, 1975 dismissing his petition for habeas corpus.

Dated: New York, New York
July 9, 1975

ELEANOR JACKSON PIEL
Attorney for Petitioner
Fred Edwin Johnson

TO: LOUIS J. LEFKOWITZ
Attorney General
State of New York

PETITION FOR WRIT OF HABEAS CORPUS

District Court of The United States
For The Southern District of New York

United States of America, ex rel.
Fred Edwin Johnson,

Petitioner,

-vs-

Hon: Vincent R. Mancusi,
Superintendent, Attica Correctional
Facility,

Respondent.

Petition For Writ

Of Habeas Corpus

Civ. No. _____

Comes the petitioner, Fred Edwin Johnson, and petitions
this Court for a Writ of Habeas Corpus pursuant to Title 28,
United States Code, Section 2241 (C-3), (D).

1). Petitioner is presently serving a sentence of from one and
one-half (1½) to three (3) years, as a result of his conviction
by plea to the crime of Operating a Policy Business, entered
in New York County Supreme Court on June 22, 1966 (Gellinoff,
J.).

2). The issues which comprised the fundamental errors pro-
secuted on direct appeal of petitioner's conviction, and by appli-
cation for a Writ of Error Coram Nobis, are joined in this pro-
ceedings for the purpose of continuity and a comprehensive dis-
closure of the facts which prove that the conviction and sen-
tence, under which he is detained, was imposed in violation of
the Sixth and Fourteenth Amendment to the United States Consti-
tution.

- 3). That, more specifically, petitioner's right to Due Process of law was violated where the court refused to allow the withdrawal or vacature of his plea, which was entered upon the erroneous and misleading advice of counsel as to a sentence promise from said court.
- 4). Moreover, petitioner right to be effectively represented by counsel, as guaranteed him under the Sixth Amendment, was denied him at a critical stage of the proceeding, namely, the plea bargaining process, by the erroneous and misleading advice rendered petitioner by counsel.
- 5). That the facts setting forth and supporting the above claims are fully set out in the accompanying Memorandum of Law.
- 6). Petitioner has exhausted his state remedies pursuant to Title 28, U.S.C., Section 2254, by first raising the points herein to the trial court in a motion to withdraw the plea of guilty. This application was denied.

Petitioner appealed and the Appellate Division unanimously affirmed without opinion (27 AD 2d 904). Leave to Appeal to the New York State Court of Appeals was denied.

On October 25, 1967, petitioner moved the nisi pruis court for a writ of error coram nobis asserting the claims and facts herein. On March 7, 1967, Judge George M. Carney denied the application after a hearing. The Appellate Division unanimously affirmed without opinion (31 A.D. 2d 792). Leave to Appeal to the New York State Court of Appeals was denied by Judge Adrian P. Burke on May 15, 1969. Reargument denied on August 14, 1969.

Petition for Writ of Habeas Corpus

A-5

Because of the foregoing facts, petitioner is being restrained of his liberty by Respondent in violation of the Constitution of the United States, and he therefore prays that the writ be granted and an order be entered discharging him from custody.

Sworn to before
me this 26 day of May 1971

Edward V. Brady
Notary Public

EDWARD V. BRADY
Notary Public, State of New York

Fred S. John
Petitioner, Pro Se
Box 149
Attica, N.Y. 14011
NYSIIS 477 336

**OPINION OF MR. JUSTICE CARNEY DENYING
PETITIONER CORAM NOBIS RELIEF IN NEW
YORK SUPREME COURT**

Mr. Justice CARNEY denied the applications of all three petitioners upon an opinion which, after reciting the background of the case, reads as follows:

"In this present application, it is the defendants' contention that the defendants did not voluntarily and with full knowledge plead guilty; that they were "pressured" into entering their pleas by the attorney Kestnbaum and by his alleged representation that because of his friendship with the judge, he had a 'guarantee' and a promise that their sentences would not exceed six months. They also base their application upon the claim that they were ineffectively represented by counsel.

"The defendants pleaded guilty, not because they were coerced into doing so, or did so involuntarily, but because Mr. Kestnbaum had convinced them that the People had a strong case and because they felt that they could safely gamble on his alleged friendship with the judge and his estimate of a sentence of not exceeding six months which they assumed to be a promise. When they found out around sentencing time that the proposed sentence was not an actual promise of the Judge as they had assumed, but only an estimate by the lawyer, then they decided to withdraw their plea if possible.

"All three of these defendants are men in their adult years with criminal records. They knowingly entered their pleas of guilty after a full statement of the facts by the district attorney and a full and complete interrogation of each defendant by the court. Nothing that occurred during this proceeding cast doubt upon their guilt of the crimes to which they were

**Opinion of Mr. Justice Carney Denying
Petitioner Coram Nobis Relief in New
York Supreme Court**

A-7

pleading guilty. The pleading proceeding complied in all respects with the standards required in this State (Pee. v. Nixon, — N.Y.2d —, 1967).

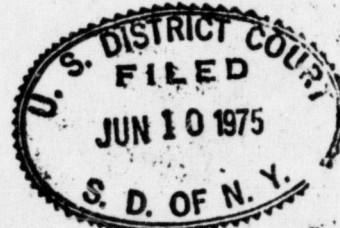
"There is no claim here that Judge Gellinoff or the District Attorney made any promise to these defendants, that if they pleaded guilty, any particular sentence would be imposed. In fact it was stipulated that no such promises were made and Justice Gellinoff and Kestnbaum so testified. Consequently, if the defendants were induced to plead guilty by some misrepresentation or estimate of retained counsel, as to what their sentence would be, this would be no basis for the granting of a writ of error coram nobis (Pee. v. Vance, 7 A.D.2d 661).

"It is the defendants' claim that they were denied effective representation of counsel, because they claim counsel did not prepare the case, pressured the defendants into pleading guilty and failed to make a proper application to withdraw the pleas of guilty on grounds that the defendants now claim should have been advanced. Both counsel were experienced lawyers who for many years have, to the court's knowledge, tried cases in the Criminal Courts. They were retained by the defendants, not assigned by the court. There was nothing about their representation of these defendants that would have put the Justice who took the pleas and who sentenced them on notice that the attorney was not adequately and properly representing his client, if that be the fact. Because at a later date a defendant may question or quarrel with the acts of his attorney is not a basis for coram nobis (Pee. v. Brown, 7 N.Y.2d 359; Pee. v. Tomaselli, 7 N.Y.2d 350).

"For all the reasons above mentioned the application of each defendant is in all respects denied."

OPINION AND ORDER APPEALED FROM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



UNITED STATES OF AMERICA ex rel.
FRED EDWIN JOHNSON,

Petitioner,

-against-

HON. VINCENT R. MANCUSI,
Superintendent, Attica Correctional
Facility,

OPINION AND ORDER

71 Civ. 2426

#42573

Respondent.

APPEARANCES:

ELEANOR JACKSON PIEL, ESQ.
Attorney for Petitioner

HON. LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
By: Arlene Silverman, Esq.
Assistant Attorney General
Of Counsel

KEVIN THOMAS DUFFY, D.J.

Petitioner Fred Edwin Johnson was sentenced to consecutive prison terms of one year and one-and-one/half to three years on June 22, 1966, following his plea of guilty on May 16, 1966 to two gambling-related, state criminal charges. He brought the present habeas corpus

action while confined in New York State's Attica Correctional Facility, serving the second of those terms. Although subsequently released,^{1/} he has continued this suit, charging that his plea of guilty was involuntarily entered and should be set aside, and that he was denied effective assistance of counsel both when he changed his plea from not guilty to guilty, and also at sentencing when he sought to withdraw his guilty plea.

Johnson was indicted, along with Frank Shepperson and Robert Royals, on one misdemeanor charge of conspiring to bribe public officers, operate a "policy" business, and assist in an illegal lottery, and on seven felony counts relating to their participation in the policy business or "numbers game". Shepperson and Royals retained Nathan Kestenbaum, Esq. to represent them. At Kestenbaum's suggestion, Johnson, who had discharged his first lawyer, retained Morris, Levy, Esq. Levy, however, deferred almost entirely to Kestenbaum in this case.

On May 16, 1966, when the defendants and their lawyers were scheduled to appear before Judge Gellinoff of the New York Supreme Court, Kestenbaum and Levy met with Johnson at the "bullpen" at the courthouse. At that time, Johnson was serving a sixty-day sentence on unrelated state charges and had not seen Shepperson or Royals, or the two

lawyers, for two or more weeks. Kestenbaum surprised Johnson by telling him that Shepperson and Royals had agreed to plead guilty, and he urged Johnson to do likewise. Kestenbaum told Johnson that the State had a very strong case^{2/} and would "waste" or "bury" him if he went to trial. Johnson also had a number of gambling convictions in his record,^{3/} which could have possibly been brought out if he testified. Moreover, he apparently had no satisfactory explanation for some of the meetings charged.

What else Kestenbaum said has been the subject of substantial dispute. According to Kestenbaum's testimony,^{4/} he told Johnson that in his opinion Johnson would be sentenced to no more than several months if he pleaded guilty, as opposed to a possible eleven years if he stood trial and were convicted on all counts, as Kestenbaum thought likely. Kestenbaum testified that he told Johnson that he knew Judge Gellinoff; that he had had a dinner with the Judge, during which they discussed the Judge's sentencing philosophy generally; that he thought the Judge was a mild person (recalling one or two cases where the Judge had imposed markedly mild sentences). Johnson, on the other hand, claims that Kestenbaum told him that he had a guarantee or promise from the Judge that Johnson would get only six months if he pleaded guilty.

Johnson resisted pleading guilty, protesting his innocence. The case was called and Kestenbaum secured a fifteen-minute adjournment in order to continue talking to Johnson. Johnson claims that he wanted to talk to Shepperson or Royals, but was unable to. Finally, he says, he agreed to plead guilty because of Kestenbaum's representation that the government would "waste" or "bury" him if he went to trial and because Kestenbaum allegedly had a guarantee from the Judge of a six-month sentence.

The transcript from the hearing at which Judge Gellinoff accepted the defendants' guilty pleas that same day shows that Judge Gellinoff spelled out the charges to which the defendants were pleading, noting that one was a misdemeanor and one a felony. The defendants admitted having committed the acts charged and stated that they were pleading guilty voluntarily. Judge Gellinoff asked whether any promise had been made to them by anyone as to the sentence the court might impose, to which they replied "no". The defendants, prior to pleading guilty, were also advised that, under the law, a person charged with a felony may receive greater or different punishment if he has been previously convicted of another felony. Thus, if it were discovered that one of the defendants had been convicted of a prior felony,^{5/} this could affect his sentence. Sentencing

was set for June 20, 1966. The Judge said that he wanted to sentence them soon, but that he wanted an "adequate time to make as good an investigation as I can - - - to do the best I can."

Johnson, having completed serving the sixty-day sentence, was released on June 17th, and saw Kestenbaum again for the first time at the courthouse on June 20th. Johnson has testified that he had been thinking about the alleged guarantee or assurance of the six-month sentence and really doubted that the Judge had made such a promise. He said that on June 20th "(I) continued to disagree with (Kestenbaum) as to his belief of the promise that I might be able to get the six months, and I wanted him to make an application to the court to withdraw my plea."^{6/} Kestenbaum testified that, as best as he could recall, the defendants that day asked if everything had been arranged, to which he replied that there was no arrangement. He said "I kept repeating for quite sometime prior to this and on the day of sentence that I expected the sentence to be several months." Kestenbaum testified that Shepperson and Johnson responded that they had assumed they were assured of a sentence of only several months and said they wanted their pleas withdrawn.^{7/}

Johnson claims that he insisted that Kestenbaum move to withdraw his plea on the grounds that no one had come

to him in jail prior to May 16th to tell him what he had pleaded to; that he had not understood what he was pleading guilty to; that now he understood that it was a misdemeanor and a felony; and that he felt he was innocent and wanted to withdraw his plea.^{8/}

Kestenbaum cautioned against this, and when called before the court on June 20th, he simply asked the court for a two-day extension. On June 22nd, when the court asked whether the defendants had any legal or other cause to show why judgment should not be pronounced against them, Kestenbaum moved on behalf of Johnson and Shepperson to withdraw their pleas. (Levy was not present at sentencing; Johnson consented to have Kestenbaum represent him.) Kestenbaum told the court that the defendants now thought that their pleas were "ill-advised" and that the state had insufficient evidence to convict them. The court, after detailing the interrogation it had conducted before accepting the defendants' pleas, denied the motion. After further argument by Kestenbaum (directed to sentencing) that defendants should not be penalized for their failure to cooperate with the police, and after the prosecutor summarized the scope of defendants' activities and the strong evidence the state had against them, the court imposed sentence. The court never addressed Johnson personally prior to either the denial of

the motion or the imposition of sentence. Johnson claimed on direct examination before Judge Carney that just before sentencing he tried to speak to the court and present all his reasons for wanting to withdraw his plea, but that a court officer put his hand over Johnson's mouth and told him to be silent. It is significant, however, that on cross-examination Johnson testified that this episode occurred just prior to his entering the plea of guilty.

The instant petition follows Johnson's unsuccessful direct appeal^{9/} and two coram nobis petitions, all joined in by Shepperson and Royals. In the initial coram nobis petition defendants stated in an affidavit that their pleas were involuntary because they had relied on Kestenbaum's ultimately incorrect estimate of what their sentences would be. They stated that they had expected to be sentenced to several months on the misdemeanor and to receive suspended sentences on the felony. In an affidavit supporting their petition, Kestenbaum (who did not represent them in this proceeding), stated that he had erred in his estimate of the sentence. Kestenbaum also charged that by imposing consecutive sentences the court was improperly trying to induce defendants to cooperate with the police in an effort against gambling and police corruption, in order to have their felony sentences suspended. Judge Gellinoff denied this petition without a hearing on May 18, 1967.

In the second coram nobis petition, brought in October 1967, the defendants alleged that they had been induced to plead guilty not by defense counsel's faulty estimate, but by his representation that the judge had promised a sentence of not more than six months.^{10/} Judge Gellinoff disqualified himself, ordered a hearing, and the case was transferred to Judge Carney. Judge Carney held a four-day hearing in late November and early December, 1967. At the hearing defendants were represented by counsel, Raymond A. Brown, Esq. Aaron Jaffe, Esq., the attorney who had drawn up the initial coram nobis petition, was also present. Johnson, Shepperson and Royals all testified, as did Raymond Shepperson (the defendant's brother), Kestenbaum and Judge Gellinoff. It was stipulated by both the state and the defendant that in fact there had been no promise made nor assurance given by Judge Gellinoff of a six-month sentence. Of his contact with Kestenbaum, Judge Gellinoff said they had met at a dinner party prior to the time this case was assigned to his calendar; that Kestenbaum had invited him to a cocktail party at his home that was held sometime after sentencing; and that he spoke to Kestenbaum once at the bench between the acceptance of the plea and the sentencing, at which time he asked directions to Kestenbaum home. He said that he and Kestenbaum had spoken about the case only once, and that the

prosecutor had been present at the meeting. All had agreed that defendants would be treated as first felony offenders. Judge Carney, in denying the petition in an opinion filed February 15, 1968, found that:

"The defendants pleaded guilty, not because they were coerced into doing so, or did so involuntarily, but because Mr. Kestenbaum had convinced them that the People had a strong case and because they felt they could safely gamble on his alleged friendship with the judge and his estimate of a sentence of not exceeding six months which they assumed to be a promise. When they found out around sentencing time that the proposed sentence was not an actual promise of the Judge as they had assumed, but only an estimate by the lawyer, then they decided to withdraw their plea if possible.

"All three of these defendants are men in their adult years with criminal records. They knowingly entered their pleas of guilty after a full statement of the facts by the district attorney and a full and complete interrogation of each defendant by the court. Nothing that occurred during this proceeding cast doubt upon their guilt of the crimes to which they were pleading guilty. The pleading proceeding complied in all respects with the standards required in

this state (Peo. v. Nixon, 21 N.Y.2d 338).

"There is no claim here that Judge Gellinoff or the District Attorney made any promise to these defendants, that if they pleaded guilty, any particular sentence would be imposed. In fact it was stipulated that no such promises were made and Justice Gellinoff and Kestenbaum so testified. Consequently, if the defendants were induced to plead guilty by some misrepresentation or estimate of retained counsel, as to what their sentence would be, this would be no basis for the granting of a writ of error coram nobis (Peo. v. Vance, 7 A.D.2d 661)."

With respect to the claim that defendants were denied effective assistance of counsel, Judge Carney denied the petition on the ground that both counsel (Kestenbaum and Levy) were experienced criminal lawyers, both were retained by defendants and not assigned by the court, and "there was nothing about their representation of these defendants that would have put [Judge Gellinoff] on notice that the attorney was not adequately and properly representing his client, if that be the fact." He found that the defendants belated complaints provided no basis for coram nobis relief.

Only Johnson appealed that decision which was affirmed by the Appellate Division without opinion, on April 2, 1969. 32 App.Div.2d 614 (1st Dept.) Having exhausted his state remedies, Johnson, over two years later, filed the instant petition.^{11/}

In-support of his claim that his plea was involuntary, Johnson argues that the state court applied an incorrect legal standard. Judge Carney, as quoted above, stated that even if Johnson had been induced to plead guilty by some misrepresentation by defense counsel as to what the sentence would be, such a misrepresentation would provide no basis for setting aside the guilty plea.

Cases in this circuit have held that where a defendant's expectation of leniency is induced by an erroneous estimate made by defense counsel, a guilty plea will still be found to have been made voluntarily. E.g., United States ex rel. LaFay v. Frits, 455 F.2d 297 (2d Cir. 1972), cert. denied 407 U.S. 923 (1972). Similarly, where a defendant pleads guilty under the subjective mistaken impression that a promise of a lenient sentence has been made by a judge or prosecutor, the plea will be found voluntary. See e.g., United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1098 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973).

However, where a defendant proves that the circumstances as they existed at the time of the guilty plea, judged by objective standards, reasonably justified his mistaken impression that a promise of leniency had been made, a guilty plea will be set aside as involuntary (see Mosher v. LaVallee, 491 F.2d 1346, 1348 (2d Cir.), cert. denied, 416 U.S. 906 (1974); United States ex rel. Oliver v. Vincent, 498 F.2d 340, 341 n.1 (2d Cir. 1974)) just as it would be if there were in fact an unfulfilled promise of a lenient sentence made by a judge or prosecutor (Santobello v. New York, 404 U.S. 257 (1971)). In both Mosher and Oliver courts relied upon misrepresentations by defense counsel, believed by the defendant, that a promise of leniency had been made, as the basis for finding that the guilty pleas had been involuntarily entered.

Johnson argues that this case falls within Mosher and Oliver. However, Judge Carney found that Kestenbaum had made an estimate of the sentence Johnson and his co-defendants would receive; which estimate they only assumed to be a promise. Judge Carney's factual findings, reached after a full hearing, must be presumed correct, unless Johnson can prove by convincing evidence that they are erroneous. 28 U.S.C. § 2254(d). In this case there is an ample basis for Judge Carney's conclusion that Kestenbaum gave only his estimate of what the sentence could be. Judge Carney viewed the demeanor of the

witnesses and chose to credit Kestenbaum's testimony. Corroborating Kestenbaum's testimony was the fact that the defendants, in their initial coram nobis proceeding (where they were no longer represented by Kestenbaum), asserted only that Kestenbaum's estimate or opinion of the sentences they would receive had been erroneous. In addition, there is the fact that the defendants told Judge Gellinoff, at the time they pleaded guilty, that no promises had been made. This latter factor is not determinative in all cases.^{12/} However, in these circumstances, the finding of the state court that Kestenbaum gave only his estimate of what the sentences would be must stand.

Johnson argues, however, that there was a reasonable basis to support his interpretation of Kestenbaum's remarks as indicating that a promise of leniency had been made by the judge. In particular, he argues that he was pressured into pleading guilty that one morning at the courthouse and that Kestenbaum said he had had dinner with the judge and knew him personally. However, even if these factors were believed, they are not enough to bring Johnson within the rule of Mosher and Oliver. It should be noted that Judge Carney described the defendants as merely "assuming" that Kestenbaum's estimate was a promise, suggesting that he felt there was not a substantial basis to justify defendants' mistaken belief of

a promise of leniency. Moreover, in contrast to Oliver and Mosher, there was no affirmative misrepresentation by the lawyer. In fact, there is reason to believe from Johnson's own testimony that at the time of the plea, Johnson himself doubted that a promise had been made, even though in pleading guilty he allegedly relied upon the representation that such a promise had been made.¹³ Furthermore, Kestenbaum's alleged friendship or familiarity with the judge would have been a factor to which Kestenbaum might refer in order to lend credence to his ability to mitigate the sentence the judge might impose. Although such references carry the danger of misinterpretation, it is not at all clear that anyone would be justified in interpreting them as Johnson claims he did.

I find, upon a review of the record and in light of Judge Carney's findings after a full hearing, that Johnson has not met his burden of proving that the circumstances reasonably justified his alleged mistaken impression that a promise of leniency had been made by the judge.

Johnson's second claim is that he was denied effective assistance of counsel. The burden Johnson must carry here is a heavy one. Counsel's conduct must have been such as would "shock the conscience of the court" or make the proceedings a mockery of justice and it must have de-

prived defendant of substantial rights. See United States ex rel. Marcellin v. Mancusi, 462 F.2d 36, 42-43 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973). In the Mosher case, this burden was sustained by petitioner, where the attorney's flat misrepresentation that there was a promise from the judge was found so shocking as to have deprived petitioner of substantial constitutional rights. It has not been sustained here.

It should be noted that Levy and Kestenbaum may not have done all they might to eliminate the possibility of even a subjective mistaken impression by Johnson and the other defendants that a promise of leniency had been made by the judge. Counsel should make it clear that an estimate is only that, and that a judge might impose a different sentence, even at the risk of deterring a defendant from entering a plea which his counsel believes to be in his best interest. However, counsel's failure to emphasize that six months was only his estimate is significantly different from counsel's affirmative misrepresentations in Mosher that a promise of leniency had been made. Moreover, even Johnson admits that prior to sentencing he was aware that no promise had been made, yet, as discussed below, he made no significant effort to have his alleged mistaken belief that a promise had been made called to the attention of the court.

With respect to the sentencing hearing, Kestenbaum admitted to Judge Carney that he had not fully stated what

he perceived to be defendants' reasons for moving to withdraw their guilty pleas.

"THE COURT: So that, when you came up for sentence and they asked you to make an application to withdraw their plea, you in your own mind knew that they had the thought in their mind that you were guaranteeing that they were going to get a certain sentence based on a promise from the judge.

THE WITNESS (KESTENBAUM): That's right.

Q(THE STATE): Why didn't you make that application in those terms, Mr. Kestenbaum?

*** [Objections overruled]

A: Well, this was in June of 1966, Mr. McGuire. As I understood the law with respect to--

***[Objections overruled]

A. I didn't think that was material to the matter of withdrawal of a plea.

THE COURT: Why not? In other words, if it was a fact that these people agreed to plead guilty on the false assumption, as you claim, that you had a promise from the judge that they would get a certain sentence, why wasn't that important? That showed the reason they wanted to withdraw the plea, didn't it?

THE WITNESS: Except that my understanding of the law was, Your Honor, that where the court makes a promise and doesn't keep it, that entitles the defendants; but where there has been a lack of communication between attorney and client, it was my impression of the law as it existed then that that was no basis for the withdrawal of a plea.

THE COURT: Technically, no; but there might be something the judge might be interested in hearing.

THE WITNESS: Yes."

Assuming, as Judge Carney found, that Kestenbaum had only given Johnson his estimate of the sentence imposed, Kestenbaum's interpretation of whether Johnson was entitled to withdraw his plea was understandable. On the other hand, the judge certainly had the power to grant the motion in these circumstances. The state had suffered no prejudice--the case probably would not otherwise have come to trial by that time and no evidence would have been lost. In addition, Johnson had not waited until receiving a sentence greater than he expected before moving to withdraw his plea.

Johnson claims that Kestenbaum's failure to state fully the reasons Johnson wanted to withdraw his plea was especially prejudicial because he did not have an opportunity to address the court himself prior to the court's

denial of the motion or the imposition of sentence. Although this situation would not arise again in New York today, as the courts are required to ask each defendant if he wishes to make a statement prior to the imposition of sentence, N.Y.Crim.Proc.Law § 380.50 (McKinney 1971), prior state law (N.Y.Code Crim.Proc. § 480, amended Sept. 1, 1971) required the court only to make a general inquiry of the defendants and their counsel, as it did here.^{14/} Here, only Kestenbaum spoke on behalf of the defendants. Neither Shapperson, Royals, nor Johnson said anything on their own behalf.

With regard to whether Johnson tried to speak up, however, there is nothing in the transcript from the sentencing hearing to indicate that there was a disturbance of any kind or that Johnson tried to say anything. In fact, as noted above, Johnson's testimony as to the occasion of his attempt to address the court was inconsistent. Moreover, Kestenbaum testified that he did not recall such an incident, although as Johnson was standing off to his side, he indicated that he might not have noticed it unless it was called to his attention.

On the basis of the record, I conclude that Johnson, if he made any effort to speak up, certainly did not make much of an effort. It would clearly not have

required much before the judge, or the court reporter in the minutes, would at least have taken notice that something was happening involving the defendant. Instead, Johnson chose to remain silent as the prosecutor, the judge, and Kestenbaum discussed the scope of defendants' criminal activities, the strong evidence against them, and the fact that they should not be "punished" for their refusal to cooperate with the police (on fear of their lives) in its efforts to crack a citywide gambling ring.

Although Johnson now complains that Kestenbaum did not make all the arguments he should have at sentencing, the fact that Johnson made no significant effort to speak up, if indeed he made any effort at all, seems to me to undercut any claim he has that he was substantially prejudiced as a result of Kestenbaum's conduct. In these circumstances, I do not believe that Johnson was unconstitutionally denied effective assistance of counsel at sentencing, or through the entire process including the entry of the guilty plea.

The assistance to the Court of Eleanor Jackson Peel, Esq., who undertook to represent this petitioner after the petition had been filed and who did a thoroughly professional work in so representing the petitioner, is noted and deeply appreciated.

Opinion and OrderAppealed From

A-27

Petition dismissed.

SO ORDERED.

S/ Kevin Thomas Duffy
U. S. D. J.

Dated: New York, New York

June 10, 1975.

FOOTNOTES

- 1/ Johnson completed serving the second prison term.^{on}
- 2/ The state had a number of undercover agents who had allegedly observed the defendants conducting their gambling business over a period of months. It even had films of them collecting debts, signalling the winning numbers to people on the block, and the like. See Sentencing Transcript at 9-16.
- 3/ These were apparently all misdemeanors, but they involved conduct similar to that with which Johnson was charged here. Indeed, it may have been the same conduct, with the state having made it a felony rather than a misdemeanor over the intervening years.
- 4/ References to testimony by the various parties are to testimony given at the state coram nobis hearing held before Judge Carney in 1967 and described below. Neither party has asked that this court hold a second evidentiary hearing, and to the extent that this court finds it necessary to make further factual findings, the parties have agreed that this can be done on the basis of that record. The testimony at that

- 4/ hearing was directed at the very issues now before cont. this court; the transcript is 429 pages long; and certainly the witnesses' memories as to what occurred in May and June 1966 were much fresher at the hearing than they would be now, almost nine years after the events in question have occurred.
- 5/ As there was an agreement that defendants would be treated as first felony offenders, it appears that one or more of the defendants may have been previously convicted of a felony which the court was going to disregard. The reference to prior felonies here would refer to felonies not already disclosed to the court at the time the guilty pleas were offered and accepted.
- 6/ Transcript from the Coram Nobis Proceeding (hereinafter TR.) at 217.
- 7/ TR. 386.
- 8/ TR. 201
- 9/ Johnson's conviction and sentence were affirmed without opinion by the Appellate Division, First Department, on March 9, 1967.

- 10/ The second coram nobis petition was brought following the dismissal, without prejudice, of a federal habeas corpus action making these new allegations, for failure to exhaust state remedies. (67 Civ. 3545, S.D.N.Y.) (Tyler, J.)
- 11/ The present petition was filed on May 28, 1971. On February 2, 1972, Judge Motley denied the appointment of counsel and ordered Johnson to submit a reply to the state's answering papers. The case was transferred to my calendar in late 1972 following my appointment to the bench. Upon a reconsideration of Johnson's petition, counsel was appointed to represent him. Argument was heard on January 24, 1975.
- 12/ See, e.g., United States ex rel. Oliver v. Vincent, 498 F.2d at 342 n.1.
- 13/ TR. 219, 271.
- 14/ Sentencing Transcript at 2. After denial of the motion to withdraw the guilty plea, the court inquired whether Shepperson has anything further to say. Kestenbaum spoke up and addressed the court with respect not only to Shepperson, but to Johnson and Royals as well. None of the defendants spoke on their own behalf.

2 Copies Received
Date August 27, 1975
Firm Mr. Louis J. Lefkowitz
By _____

COPY OF THE WITHIN PAPER
RECEIVED
OF LAW

AUG 27 1975

NEW YORK CITY ATTORNEY
ATTORNEY GENERAL

Louis J. Lefkowitz